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IN THE

Supreme Court of the United States

October Term, 1958

No. 191

CITY BONDED MESSENGER SERVICE, INC., *et al.*,
Petitioners,

vs.

CITY MESSENGER OF HOLLYWOOD, INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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BRIEF FOR THE RESPONDENT IN OPPOSITION

City Messenger of Hollywood, Inc., Respondent, by Harry G. Fins and David O. Kuh, its Counsel, respectfully presents to this Honorable Court the following in opposition to the petition for certiorari herein:

POINT I

The Lanham Trade-Mark Act is not involved since petitioners' action for unfair competition expressly sought recovery only for "common law rights" and did not assert any federal cause of action.

It should be noted that Count I of the Counterclaim expressly relied on diversity of citizenship for jurisdiction and alleged as follows (Appellant's Appendix 24 below):

"As a counterclaim Defendant, City Bonded Messenger & Trucking Service, Inc., praying for the relief hereby sought avers:

1. Defendant, City Bonded Messenger & Trucking Service, Inc., is a corporation organized and existing under and by virtue of the laws of the State of Illinois, with its principal place of business in the City of Chicago, County of Cook, and State of Illinois.

2. Plaintiff is a corporation organized and existing under the laws of the State of California, with a place of business in the City of Chicago, County of Cook, and State of Illinois.

3. The matter in controversy herein exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars ($3,000.00)."

It must also be noted that Count I of the Counterclaim was filed on June 28, 1955 (Appellant's Appendix 24 below) *before the counterclaimant had a registered service mark*, and that Count I of the Counterclaim *expressly alleges an infringement upon the counterclaimant's* "common law rights *by using . . . a service mark dominated by the word City*" (Appellant's Appendix 26 below).

The Court of Appeals for the Seventh Circuit in the opinion in the case at bar (Appendix to Petition for Certiorari, pages 17a-17b) said:

"Defendant-counterclaimants insist that Count I of the counterclaim asking damages for unfair competition is a federal cause of action governed by the Federal Trade-mark Act (Lanham Act) 15 U.S.C.A. 1051-1127. Apparently, at the time that Count was prepared and filed, the attorneys for defendant-

counterclaimants were not of this view. An examination of the Count shows that it was based expressly upon diversity of citizenship. The first three paragraphs of Count I assert the diversity of citizenship of the parties to this action and that the matter in controversy exceeded, exclusive of interest and costs, the sum of Three Thousand Dollars. Furthermore, Count I was filed before claimants had a registered service mark. Count I expressly alleged an infringement of defendant-counterclaimants' 'common law rights by using * * * a service mark dominated by the word City * * *.' We hold that Count I does not assert a federal cause of action.'"

The petitioners, by seeking to enforce only their "common law rights," waived all questions under the Lanham Act.

POINT II

Five United States Courts of Appeals have expressly held that the Lanham Trade-Mark Act does not apply to unfair competition in the United States between American citizens.

The contention of the petitioners that unfair competition in the United States between American citizens is governed by the Lanham Trade-Mark Act has been expressly overruled by the United States Courts of Appeals for the Second Circuit in 1953, the Third Circuit in 1954, the Fifth Circuit in 1957, the Eighth Circuit in 1957, and the Seventh Circuit in 1958.

In *American Auto Ass'n* v. *Spiegel*, 2 Cir., 205 F. (2d) 771 (1953) certiorari denied 346 U. S. 887, Judge Learned Hand, writing the unanimous opinion of the Court, said at pages 774-775:

"Subsection 1126(h) declares that 'Any person designated in subsection (b) as entitled to the benefits and subject to the provisions of this chapter shall be entitled to effective protection against unfair competition, and the remedies * * * for infringement of marks shall be available so far as they may be appropriate in repressing acts of unfair competition.' Since this subsection is limited to 'person designated in subsection (b)', we look to that subsection to learn its scope. It grants to aliens and to others, domiciled, or doing business, in a foreign country 'the benefits * * * of this chapter to the extent and under the conditions essential to give effect to any such conventions and treaties'; *i.e.*, to those conventions and treaties that the subsection has just mentioned. The first two of these are specified conventions of 1883 and 1929, and the third is described as 'any other convention or treaty relating to trade-marks, trade or commercial names or the repression of unfair competition.' Since only persons so described are entitled to protection against 'unfair competition,' no one may invoke the remedies otherwise available under the Act to whom some 'benefit' has not been granted by a 'convention' or a 'treaty.' Since subsection (b) is confined to aliens and non-residents, the plaintiffs must bring themselves within subsection (i), upon which alone jurisdiction over this action must rest. It provides that United States citizens 'shall have the same benefits as are granted by this section to persons described in subsection (b) of this section.' That means that citizens shall have whatever 'benefits' subsection (b) gives to aliens; and, so far as concerns 'unfair competition,' those 'benefits' are limited to such as may be found in some 'conven-

> tion or treaty relating to * * * the repression of unfair competition'. The purpose of this subsection, quite clearly, is no more than to extend to citizens and residents those 'benefits' that any 'convention or treaty' gives to aliens, including the same remedies for 'protection against unfair competition' that subsection (h) gives to aliens. (The same purpose appears in subsection (g) as to 'trade-names.') Having implemented such 'conventions and treaties' by subsections (g) and (h) in favor of aliens, Congress very naturally wished to put citizens on an equal footing. We are forced to the conclusion that the Act does not give jurisdiction to the district courts over an action brought by any plaintiff with whose interstate commerce the defendant has unfairly competed."

In *L'Aiglon Apparel, Inc.* v. *Lana Lobell, Inc.*, 3 Cir. 214 F. (2) 649 (1954), the Court of Appeals for the Third Circuit said at page 652:

> "The second Circuit view is that Section 44, which together with Section 39 contains the provisions of the Lanham Act relied on here as the basis of jurisdiction, reveals merely a design to give United States citizens reciprocal rights against foreign nationals where foreign nationals compete unfairly with them. It does not aim to create a federal law of unfair competition available to United States citizens one against the other nor does it grant the federal courts any new authority to hear such controversies between citizens. *American Automobile Association* v. *Spiegel*, 2 Cir., 1953, 205 F. 2d 771. Accord: *Old Reading Brewery, Inc.* v. *Lebanon Valley Brewing Co.*, M. D. Pa. 1952, 102 F. Supp. 434."

In *Royal Lace Paper Works, Inc.* v. *Pest-Guard Products, Inc.*, 5 Cir., 240 F. (2) 814 (1957), the Court of Appeals for the Fifth Circuit said at page 818:

> "For the reasons hereafter briefly stated, we find ourselves in agreement with appellants' view that the Lanham Act does not support plaintiff's claim to jurisdiction, rather than with the view of appellee that it does.
>
> Looked at independently of the decision cited and relied on by the parties and construed, as such a statute ought to be, as a consistent whole, we find no language in it in terms conferring jurisdiction as to claims dealing with unregistered trade marks or with unfair competition. Specifically concerned, as it is, with registered trade marks, it would, we think, be to rewrite instead of to construe the statute if we should read it as including within its scope unregistered trade marks or unfair competition generally."

In *Iowa Farmers Union* v. *Farmers' Educational & Cooperative Union*, 8 Cir., 247 F. (2) 809 (1957), the United States Court of Appeals for the Eighth Circuit, on petition for rehearing said at page 819:

> "Our decision is in accord with those of the Second, Third and Fifth Circuits in *American Auto Association* v. *Spiegel*, 2 Cir., 205 F. 2d 771; *L'Aiglon Apparel* v. *Lana Lobell, Inc.*, 3 Cir., 214 F. 2d 649 and *Royal Lace Paper Works, Inc.* v. *Pest-Guard Products, Inc.*, 5 Cir., 240 F. 2d 814."

The Court of Appeals for the Seventh Circuit in the opinion in the case at bar 254 F. 2d 531 (Appendix, Petition for Certiorari, page 18a) said:

> "This Court is committed to the view that the claim set forth in Count I of the counterclaim for

damages caused by unfair competition is governed by the law of Illinois. *Independent Nail & Packing Co., Inc.* v. *Stronghold Screw Products, Inc.*, 7 Cir., 205 F. 2d 921, 926; *Jewel Tea Company, Inc.* v. *Krause*, 7 Cir., 187 F. 2d 278, 282; *Radio Shack Corporation* v. *Radio Shack, Inc.*, 7 Cir., 180 F. 2d 200, 202; *Wilhartz* v. *Turco Products*, 7 Cir., 164 F. 2d 731, 733. *Time, Inc.* v. *Viobin Corporation*, 7 Cir., 128 F. 2d 860, 862. We do not think that the Lanham Act changed this rule. We have been cited to no court authorities that have held the Lanham Act has changed the rule long established and followed in this Circuit. On the contrary, the contention that the Lanham Act creates an independent ground for federal jurisdiction, and that a claim for damages for unfair competition in the United States between American citizens is governed by the Lanham Act, as argued by defendant-counterclaimants, has been expressly overruled in *American Automobile Association, Inc., et al.* v. *Spiegel*, 2 Cir., 205 F. 2d 771, 775; *L'Aiglon Apparel, Inc.* v. *Lana Lobell, Inc.*, 3 Cir., 214 F. 2d 649, 654; *Royal Lace Paper Works, Inc., et al.* v. *Rest-Guard Products, Inc.*, 5 Cir., 240 F. 2d 814, 818. We agree with these decisions."

POINT III

The earlier decisions of the Ninth Circuit upon which petitioners rely have been abandoned by that Court.

In *Stauffer* v. *Exley*, 9 Cir., 184 F. (2) 962 (1950), and *Pagliero* v. *Wallace China Co.*, 9 Cir., 198 F. (2) 339 (1952), the United States Court of Appeals for the Ninth Circuit had held that the Lanham Trade-Mark Act ap-

plied to unfair competition in the United States between American citizens.

In *American Automobile Association* v. *Spiegel*, 205 F. (2) 771 (1953), the United States Court of Appeals for the Second Circuit held, directly contrary to the Ninth Circuit, that the Lanham Trade-Mark Act did not apply to unfair competition in the United States between American citizens.

During the October Term 1953 of this Court, a petition for certiorari by the American Automobile Association was presented to this Court, under Docket No. 367, wherein the conflict between the Second and Ninth Circuits was fully presented and argued. On November 16, 1953, this Court denied certiorari. *American Automobile Association* v. *Spiegel*, 346 U. S. 887.

Since then, the United States Court of Appeals for the Ninth Circuit has abandoned and no longer follows its holdings in the *Stauffer* and *Pagliero* cases, *supra*, as follows:

In *National Van Lines* v. *Dean*, 9 Cir., 237 F. (2) 688 (1956), that Court said at page 691:

> "We will first direct our attention to the specifications of error pertaining to appellant's claim of unfair competition.
>
> "As to this claim, the law of the state in which the acts occurred (California) governs."

Likewise, in *Hall* v. *Wright*, 9 Cir., 240 F. (2) 787 (1957), that Court said at page 795:

> "That the substantive law of California governs on the question of unfair competition, see: *Fashion Originators' Guild of America* v. *Federal Trade Commission*, 312 U. S. 457, 61 S. Ct. 703, 85 L. Ed.

949; *Pecheur Lozenge Co.* v. *National Candy Co.*, 315 U. S. 666, 62 S. Ct. 853, 86 L. Ed. 1103; *National Van Lines* v. *Dean*, 9 Cir., 237 F. 2d 688."

Therefore, the Ninth Circuit is now in accord with the other United States Courts of Appeal and there is no longer any conflict.

POINT IV

The United States Courts of Appeals unanimously hold that unfair competition actions are governed by state law.

From 1953 to 1958, inclusive, the eight United States Courts of Appeals which have dealt with the problem unanimously hold that actions for unfair competition are governed by state law:

First Circuit—

Esquire Inc. v. *Esquire Slipper Manufacturing Co.*, 1 Cir., 243 F. (2) 540 (1957).

Second Circuit—

American Automobile Association Inc. v. *Spiegel*, 2 Cir., 205 F. (2) 771 (1953) certiorari denied 346 U. S. 887.

Third Circuit—

L'Aiglon Apparel, Inc. v. *Lana Lobell*, 3 Cir., 214 F. (2) 649 (1954).

Fifth Circuit—

Royal Lace Paper Works v. *Pest-Guard Products*, 5 Cir., 240 F. (2) 814 (1957).

Sixth Circuit—

Tas-T-Nut Company v. *Variety Nut & Date Company*, 6 Cir., 245 F. (2) 3 (1957).

Seventh Circuit—

Independent Nail & Packing Co., Inc. v. *Stronghold Screw Products, Inc.*, 7 Cir., 205 F. (2) 921 (1953) certiorari denied 346 U. S. 886;
City Messenger of Hollywood, Inc. v. *City Bonded Messenger Service, Inc.*, 7 Cir., 254 F. (2) 531 (1958).

Eighth Circuit—

Iowa Farmers Union v. *Farmers Educational & Cooperative Union*, 8 Cir., 247 F. (2) 809 (1957).

Ninth Circuit—

National Van Lines v. *Dean*, 9 Cir., 237 F. (2) 688 (1956);
Hall v. *Wright*, 9 Cir., 240 F. (2) 787 (1957).

Our thorough research does not disclose any decision on the subject by the Courts of Appeals for the Fourth and Tenth Circuits.

POINT V

Section 43(a) of the Lanham Act (15 USC. Section 1125a) is not here involved.

The petitioners have changed their position in connection with the Lanham Act several times during the course of this litigation, as follows:

1. In Count I of the Counterclaim (Appellant's Appendix below, p. 26), petitioners based their cause of action for unfair competition upon their "common law rights".

2. Before the Court of Appeals they relied upon Section 44 of the Lanham Act (15 U.S.C. Section 1126) (Appellees' Brief below, p. 15), although on their petition for clarification and rehearing (Petition for Clarification and Rehearing below, p. 9) they casually alluded to Section 43(a) of the Lanham Act (Appendix, Petition for Certiorari, p. 28a). However, petitioners there did not contend that that section was applicable in the case at bar.

3. In the Petition for Certiorari petitioners now argue concerning Section 43(a). Nor, apparently do they now contend that that section is in any way determinative of the issues in the instant case. It would appear that they present the matter to this Court merely as their academic statement or conclusion concerning the Court of Appeals' holding regarding Section 43(a) of the Lanham Act.

The opinion of the Court of Appeals clearly sets forth its views concerning petitioner's contentions regarding the Lanham Act (Appendix, Petition for Certiorari, p. 17a) and the authorities upon which the same are based and petitioners have not shown that such views are erroneous.

POINT VI.

The District Court's findings of fact and conclusions of law not having been supported by any evidence in the record. Rule 52(a) of the Federal Rules of Civil Procedure has no application herein.

The respondent here, appellant below, contended before the Court of Appeals that the Trial Court's findings and conclusions were not based on any evidence in the record

and were contrary to the settled law and that by reason thereof Rule 52(a) of the Federal Rules of Civil Procedure (Appendix, Petition for Certiorari, p. 28a) had no application to the case at bar (Appellant's brief below, p. 44; Appellant's reply brief below, p. 32; answer to Petition for Clarification and Rehearing, p. 4).

The several points set out in its briefs before that Court fully supported that contention as to all the counterclaims in petitioners' District Court pleadings and amendments thereto. The respondent here had challenged such findings and conclusions before that Court, and it having reversed the entire judgment, the conclusion is inescapable that it sustained respondent's contentions, found that there was no substantial evidence in the record to support the findings and conclusions and that the same were therefore erroneous.

The duty of an appellate court in connection with a challenge to findings and conclusions of a Trial Court is set out in *Chatz* v. *Armour Plant Employees' Credit Union*, 7 Cir. 154 F. 2d 236 (1946) at 239, as follows:

> "A challenge of a finding of fact must be examined on appeal where the appellant asserts that the lower court's finding (a) is unsupported by substantial evidence, or (b) is contrary to the clear weight of the evidence, or (c) is induced by an erroneous view of the law. [citing in the margin] *Morley Const. Co.* v. *Maryland Cas. Co.*, 300 U. S. 185, 57 S. Ct. 325, 81 L. Ed. 593; *Harkin* v. *Brundage*, 276 U.S. 36, 48 S. Ct. 268, 72 L. Ed. 457; *Collier* v. *United States*, 173 U.S. 79, 19 S. Ct. 330, 43 L. Ed. 621; *Lawson* v. *United States Min. Co.*, 207 U.S. 1, 28 S. Ct. 15, 52 L. Ed. 65; *Campana Corp.* v. *Harrison*, 7 Cir., 114 F. 2d 400; *Pickering* v. *Corson*, 7 Cir., 108 F. 2d 546; *Flynn* v. *Smith*, 7 Cir., 90 F. 2d 305."

And the measure of the consideration to be given to such findings and conclusions by an appellate court is stated in *Campana Corporation* v. *Harrison*, 7 Cir., 114 F. 2d 400 (1940) at pages 405-406, as follows:

> "Of course Federal Rule 52 does not require us to accept fact findings unsupported by the evidence. Nor does this Rule require us to respect conclusions of law which do not rest properly on the facts so found. It is certain that the principle giving the above described weight to the trial court's findings of fact, does not compel the reviewing court to give any specific weight to the trial court's conclusions of law, as it yet remains the duty of the appellate court to decide whether the correct rule of law has been applied to the facts found. Whether special findings are supported by the evidence or whether they give the requisite support to conclusions rendered thereon, are questions open to consideration here."

It follows that Rule 52(a) does not apply to the case at bar.

Solar Corporation v. *Bork-Warner Corporation*, 244 F. 2d 940 and *Gravel Tank Co.* v. *Linde Air Prod. Co.*, 336 U. S. 271, and 339 U. S. 605, cited by petitioners, were patent cases where the appellate courts declined to disturb the findings because the District Court had had the opportunity of hearing expert witnesses and observing demonstrations of the arts involved; situations markedly dissimilar to that before the trial court in the case at bar. These cases cannot be taken as precedents applicable to this cause.

POINT VII

Rule 15(b) of the Federal Rules of Civil Procedure does not apply in this case.

Rule 15(b) of the Federal Rules of Civil Procedure, the pertinent part of which reads as follows:

> "When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings."

has no application to the case at bar since, during the trial, the respondent here could not possibly have known that petitioners intended subsequently to assert a cause of action in breach of contract. It was only after the petitioners rested their entire case that their attorney stated he thought he had made out a case of breach of contract and said he would like to put in such a count. The Trial Court granted him leave so to do as of the following day (Appellant's Appendix below, p. 189).

Consent, express or implied, can only be based on knowledge and since neither petitioners nor respondent were aware during the trial of any issue of breach of contract, respondent here could not have either knowingly or unknowingly consented thereto.

The Court of Appeals said on this phase of this case (Appendix, Petition for Certiorari, p. 25a):

> "Although amendments to conform to the evidence may properly be allowed under many situations, we think the issues in Count IV should be determined only after pleadings defining the issues have been filed and the parties have had adequate opportunity to offer evidence pertaining thereto."

and in its opinion denying the petition for clarification and rehearing (Appendix, Petition for Certiorari, p. 25a) that Court said:

> "Defendant-counterclaimants (petitioners here) insist the issues as to Count IV were tried by the implied consent of the parties. To have any kind of consent there must be knowledge. It is apparent that the claim for breach of contract contained in Count IV occurred to counsel for counterclaimants after he had rested his case. Under the circumstances, neither plaintiff nor counterclaimants tried the issue by implied consent."

The record in this case is devoid of any proof that respondent here either expressly or impliedly consented to the trial of the issue of breach of contract. Absent consent Rule 15(b) has no application.

POINT VIII

The respondent appealed to the Court of Appeals from the entire judgment of the District Court including each and every part thereof.

The Notice of Appeal to the Court of Appeals, which was drawn in accordance with Form 27 of the Supreme Court of the United States, read as follows (Appellant's Appendix below 215):

> "NOTICE OF APPEAL
>
> Notice is hereby given that City Messenger of Hollywood, Inc., a California corporation, doing business under the tradename of City Messenger Air Express, plaintiff above named, hereby appeals to the United States Court of Appeals for the Seventh Circuit from the final judgment entered in this action on March 14, 1957."

This Notice of Appeal brought up for the consideration of the Court of Appeals the entire judgment including the injunctive provision therein as well as the findings of fact and conclusions of law.

Conclusion

No confusion or conflict exists among the several Circuit Courts of Appeal concerning actions for unfair competition between American citizens, since all, including that of the Ninth Circuit, have now unanimously held that the Lanham Trade-Mark Act (15 U.S.C. Sections 1051-1127) does not apply to such actions and that the same are governed by State law.

The Court of Appeals for the Seventh Circuit gave proper regard to Rules 15(b) and 52(a) of the Federal Rules of Civil Procedure insofar as the same applied to the facts and situations in the record before it herein and in doing so did not depart from this Court's or its own previous decisions in connection with the application of such Rules.

Finally, the respondent here having appealed from the entire judgment of the District Court to the Court of Appeals that Court properly considered and passed upon all the parts thereof.

For these reasons, it is respectfully submitted, the petition for a writ of certiorari should be denied.

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and

David O. Kuh,

Counsel for Respondent.